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No. 80-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Petitioner,

v.

J. E. PALAEZ DEL CASAL and EASTERN AIR LINES, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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The Court of Appeals in this case held that whenever a union supplies counsel in grievance proceedings to members and to non-member agency fee payors, the duty of fair representation requires it to provide the same service to non-members who make no contribution to the cost of the service. The Court of Appeals upheld an award of damages against ALPA for breach of its duty of fair representation even though: (1) ALPA carried out Respondent's request that it place his grievance in arbitration before a Systems Board of Adjustment; (2) Respondent was fully represented before the Systems Board through counsel retained by him; (3) the Systems Board held that Respondent was discharged for incompetence as a pilot consistent with the collective bargaining agreement; and (4) the Court of Appeals as well as the District Court upheld the arbitration result as final and binding and concluded that ALPA's refusal to provide Respondent with staff counsel had not prejudiced

Respondent in arbitration nor undermined the integrity of the arbitration proceeding.[1]

In its recent decision in *United Parcel Service* v. *Mitchell*, 49 U.S.L.W. 4378 (April 20, 1981), decided shortly after the filing of the Petition herein, this Court stated as follows:

> "It is not enough, . . . , for an employee . . . to prove that he was discharged in violation of the collective-bargaining agreement. '*To prevail against either the company or the Union, petitioners must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union . . . .*'" *United Parcel Service* v. *Mitchell*, 49 U.S.L.W. at 4379, quoting *Hines* v. *Anchor Motor Freight*, 424 U.S. 545, 570-71 (1976) (emphasis added).

In *United Parcel Service*, the Court held that untimeliness of an individual's suit seeking to set aside an arbitration decision upholding his discharge required dismissal not only of his breach of contract claim against his employer, but also of his DFR claim against the Union. Since the untimeliness of the individual's suit precluded any showing by him that his discharge was contrary to the contract, the DFR claim was ordered dismissed along with the breach of contract claim. Here, Respondent fails to show his discharge was contrary to the contract, not because of any untimeliness of his judicial attack on the arbitration, but because the integrity of the arbitration has been judicially upheld. It nevertheless follows, here every bit as much as in *United Parcel Service*, that an employee who fails to show that his "discharge was

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[1] The intimations in the Brief in Opposition (pp. 4-5, n. 2) that Respondent was somehow prejudiced by being represented by his own retained counsel and that the Systems Board was not impartial are foreclosed by the Court of Appeals' decisions (Petition, 7a-8a).

contrary to the contract" cannot "prevail against either the company *or the Union* . . . ." *Id.*[2]

The thrust of the Brief in Opposition is its dispute with our characterization of the Court of Appeals' decision as creating a *per se* rule that unions which furnish staff counsel to dues-paying members and agency fee payors must provide the same service to non-members, such as Respondent, who make no contribution to its cost (Brief in Opposition, p. 7). Notably, Respondent concedes that ". . . such a ruling would indeed be a novel one", presumably justifying this Court's discretionary review. We submit that our characterization of the Court of Appeals' holding was correct. While the Fifth Circuit paid lip-service to decisions allowing unions to distinguish between members and non-members with respect to the conferral of internal benefits and to decide under what conditions an attorney will be supplied to a grievant, it plainly concluded that *any time a union supplies counsel to members it must provide the same service to non-members.* That the decision constitutes a *per se* rule is confirmed by the fact that the Court of Appeals held ALPA liable for a DFR breach despite its conclusion that Respondent's discharge was in compliance with the applicable collective bargaining agreement and that his employment status had in no way been harmed by ALPA's conduct.

Absent union conduct in some way thwarting a *meritorious* grievance or otherwise harming employment

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[2] Notably, Justice Stevens disagreed with dismissal of the plaintiff's DFR claim in *United Parcel Service.* Speaking for himself only, he asserted as follows: "The fact that the underlying discharge may not have violated the collective-bargaining agreement does not necessarily absolve the Union of liability for its breach, ..." 49 U.S.L.W. at 4382, n. 4. The Court's disposition of the plaintiff's DFR claim as against the Union necessarily rejects the view stated by Justice Stevens. It also necessarily requires reversal of the Court of Appeals' decision which assigned liability for breach of DFR despite upholding the arbitration decision which sustained Respondent's discharge as consistent with the collective bargaining agreement.

status, no harm cognizable nor remediable by the DFR can be found to occur. Respondent's reliance upon the "apportionment rule" of *Vaca* v. *Sipes*, 386 U.S. 171, 197 (1967) is misplaced. While liability surely is to be apportioned between the employer and the unions "according to the damage caused by the fault of each", *id.*, this hardly establishes a basis for damage recovery where union conduct has in no way harmed the plaintiff's employment status. As declared by this Court in *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 568 (1976), where the union places the employee's grievance in arbitration, ". . . the focus is . . . on whether, contrary to the arbitrator's decision, the employer breached the contract and whether there is substantial reason to believe that a union's breach of duty contributed to the erroneous outcome of the contractual proceedings." A plaintiff, such as Respondent, who fails to show that his discharge was contrary to the contract" may not prevail "against either the company *or the Union*". *Hines, supra*; *United Parcel Service, supra* (emphasis added).

CONCLUSION

For the reasons stated herein and in the Petition, the Petition for Writ of Certiorari should be granted; the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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